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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-476

FLORIDA POWER & LIGHT COMPANY, *Petitioner*

v.

GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE, FLORIDA, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE IN OPPOSITION

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Respondents, Gainesville Utilities Department and City of Gainesville (hereafter referred to collectively as "Gainesville" or "the City") respectfully submit that the Court should deny the Petition for Writ of Certiorari filed on 20 September 1978 by Florida Power & Light Company (hereafter "FPL").

QUESTION PRESENTED

The only question properly raised and presented is whether the court of appeals erred in concluding that undisputed facts of record entitled Gainesville to judg-

ment n.o.v. on the limited issue of whether FPL had combined or conspired with Florida Power Corporation to allocate territories.

STATUTE INVOLVED

This case involves § 1 of the Sherman Act, 15 U.S.C. § 1, which is reproduced in Appendix D to the Petition. The case does not present any genuine issue under either the Seventh Amendment or § 202 of the Federal Power Act, 16 U.S.C. § 824a.

STATEMENT OF THE CASE

The facts are set forth comprehensively in Chief Judge Brown's opinion for a unanimous court of appeals, reported at 573 F. 2d 292 (5th Cir. 1978) and reprinted in Appendix A to the Petition. We wish to note only a few points relating to the jury's verdict and the scope of the decision below.

After settling with Florida Power Corporation (hereafter "Florida Power"), the City went to trial against FPL on three theories: a combination or conspiracy between FPL and Florida Power to divide territories; a combination or conspiracy between the two companies not to interconnect unless the City consented to a territorial agreement; and an attempt by FPL to monopolize. The combination or conspiracy charges were brought pursuant to § 1 of the Sherman Act, 15 U.S.C. § 1, and the attempt charge pursuant to § 2, 15 U.S.C. § 2.

The case went to the jury on 14 special interrogatories. Petitioner incorrectly states that "the jury found for FPL on all 14 of the special verdicts. . . ." Petition at 4-5. In fact, the jury answered only 3 because negative answers to these questions disposed of the City's charges. The jury never reached the remaining 11 questions, which related primarily to the unresolved issues of injury, causation, and damages. *See* App. A at 13a-14a and n.9.[1]

On appeal, a unanimous court held that Gainesville was entitled to judgment n.o.v. on the existence of a combination or conspiracy between FPL and Florida Power to allocate territories, but upheld the jury's verdict in favor of FPL on both of the other charges. The court remanded for trial to determine whether the allocation had caused the City any injury, and if so, the amount of any damages. *See* App. A at 22a-24a.

FPL petitioned for rehearing and rehearing en banc on the ground that the court had denied FPL its constitutional right to a jury trial. FPL did not raise any issue under the Federal Power Act either in its rehearing petition or in the original briefing. Rehearing was denied, along with FPL's request for rehearing en banc. *See* App. B to the Petition.

REASONS FOR DENYING THE WRIT

The Petition purports to present three questions. The first two are merely different ways of camouflaging a request that this Court review the evidence. The third amounts to a nebulous plea that the Court reconsider —to what end is unclear—its decisions in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973) and *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976). This point was not raised below, is not present in the case in any event, and would not be worthy of this Court's consideration if it were.

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[1] The opinion of the court of appeals, reprinted as Appendix A to the Petition, will be cited throughout this Brief as "App. A."

I. The Lower Court's Grant of Judgment n.o.v. on the Existence of a Combination or Conspiracy to Allocate Territories Presents no Question of General Importance Requiring Review by this Court

The only genuine issue raised by the first two of FPL's questions is whether the court of appeals erred in concluding that the evidence required judgment n.o.v. That question obviously is of no general importance or precedential value and turns wholly upon the facts of the case. Certiorari will not be granted, however, to review and evaluate evidence. *See, e.g., General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178, *aff'd on rehearing*, 305 U.S. 124 (1938); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

FPL tries an end-run around this Court's settled practice by characterizing the judgment as a deprivation of its constitutional right to trial by jury. *E.g.*, Petition at 2, 3, 10, 11, 14. FPL does not claim that judgment n.o.v. is always and as a matter of law a violation of the Seventh Amendment. On the contrary, it recognizes (Petition at 14) that judgment n.o.v. may be appropriate in any given case.[2] FPL argues only that it is not appropriate in *this* case. This constitutional window-dressing is not original with FPL; petitioners routinely and unsuccessfully have sought certiorari by characterizing judgment n.o.v. or a directed verdict as violations of the Seventh Amendment. *See, e.g., England* v. *Chrysler Corp.*, 419 U.S. 869 (1974); *Cartrade* v. *Ford Dealers Advertising Association*, 405

[2] As this Court pointed out in *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967), "[T]here is no constitutional bar to an appellate court granting judgment n.o.v."

U.S. 997 (1972) (directed verdict); *Brown* v. *Lamb*, 397 U.S. 907 (1970); *Manaia* v. *Potomac Electric Power Co.*, 361 U.S. 913 (1959).[3]

FPL next asserts that the court of appeals held that proof of parallel business activity together with "any" additional evidence of coordination "compels" or "requires" a finding of concerted action. Petition at 10, 15, 18. The court, of course, nowhere suggested such a simplistic approach; it held only that the overwhelming evidence *in this case* compelled a finding of concerted action.[4]

To attack this decision, FPL resorts to conclusory assertions while ignoring the mass of undisputed evidence of concerted action with respect to Gainesville and other systems that sought to deal with FPL or Florida Power. FPL's paraphrase of the evidence relating to Chiefland and other Florida cities is illustrative. It discusses these incidents (Petition at 15-16) without mentioning that FPL and Florida Power coordinated their refusals to serve and exchanged ex-

[3] FPL is on both sides of the question. In opposing certiorari in *Manatee Cablevision Corp.* v. *Florida Power & Light Co.*, No. 78-247, FPL urged successfully that a challenge to judgment n.o.v. in a § 1 Sherman Act case does not raise any real constitutional question, and presents nothing more than a routine request that the Court review the evidence. *See* Brief of Respondent Florida Power & Light Company in Opposition at 8-9. Certiorari was denied on October 10, 47 U.S.L.W. 3246.

[4] FPL's suggestion that this distinction was lost on the court of appeals reflects the poverty of FPL's position. The cases involving "plus" factors were cited in footnote 13 to the court's opinion (App. A at 17a-18a) to illustrate the kinds of evidence that might take a case beyond mere parallel action, not for the proposition that any additional circumstantial evidence will compel a finding of concerted action.

press assurances of reciprocal treatment.[5] Compare, by way of contrast, the opinion of the court of appeals. *See* App. A at 8a-13a.[6] Similarly, in dealing with events at Gainesville, FPL ignores the collaboration between FPL and Florida Power in fashioning their responses to the inquiries by the Federal Power Commission, and FPL's cooperation with Florida Power in forcing a territorial agreement upon the City. The court's opinion again presents a vivid contrast. *See* App. A at 4a-7a, 19a-20a.

FPL also attempts to inject a false credibility issue by referring to the trial court's caustic comments about Gainesville's witnesses. Petition at 6-7. The judgment n.o.v., however, was not based even in part upon the testimony of these witnesses. The comments, and others that the trial court made, were relevant not to the territorial allocation issue, but to Gainesville's contention on appeal that the trial judge, by his open advocacy of the defense and hostility toward the City and its witnesses, had deprived the City of a fair trial and was responsible for the aberrational jury verdict.

FPL, in another misdirection play, tries to make this a "motive and intent" case by asserting that its actions vis-a-vis Gainesville and the other systems with which

[5] Nor were communications between the companies always after the fact as FPL asserts at pp. 5, 6 of the Petition. *See, e.g.*, App. A at 9a-13a. Indeed, in the case of Lake City, Florida Power's refusal was even cleared in advance between the companies over the phone. *See* App. A at 10a. FPL's president, Mr. Fite, admitted that this was "routine practice." T. 19 at 110.

[6] FPL tried the same technique in the court of appeals. As the court noted: "The text of P&L's brief does not even mention the critical exchange of letters between these ostensible competitors. . . ." App. A at 18a.

it declined to deal resulted from FPL's judgment regarding its best business interests and not from the territorial allocation. *See* Petition at 5-6, 15-16. The issue, however, as properly stated by the court of appeals (App. A at 16a), was whether an arrangement regarding territories existed, not whether it "caused" any particular refusal to deal. FPL's argument goes, if anywhere, to the issues of causation and injury, which remain to be tried.[7]

We have not reviewed here the evidence relating to the territorial allocation issue; the court of appeals has done that in its exhaustive opinion. It is sufficient to note that the evidence of concerted action is far stronger than the evidence that this Court found made out a combination or conspiracy as a matter of law in *Albrecht* v. *The Herald Co.*, 390 U.S. 145, 149 (1968).[8]

[7] FPL suggests parenthetically that the court should have remanded for consideration of a new trial on the territorial allocation issue. Petition at 12-13. This point obviously has nothing to do with FPL's "questions presented" and is of no significance apart from this case. FPL, moreover, never raised this point below and offers no justification for a new trial. The territorial issue was fully litigated, and the court was not obliged sua sponte to remand for consideration of a new trial. *See Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 329-30 (1967). In *Iacurci* v. *Lumnus Co.*, 387 U.S. 86 (1967) (per curiam), cited by FPL, the new trial point had been timely raised and related to issues that had not been resolved by the jury rather than to the issue on which n.o.v. was granted.

[8] *See also United States* v. *Container Corp. of America*, 393 U.S. 333, 335 (1969) (furnishing competitor with price information with "expectation" of reciprocal treatment constitutes combination or conspiracy).

II. This Case Presents no Occasion for Reconsidering the Decisions in *Otter Tail* and *Cantor*

In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), this Court rejected a claim that Section 202 of the Federal Power Act, 16 U.S.C. § 824a, impliedly repealed the antitrust laws in the case of a refusal to interconnect and wheel power. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), involved a claim that, under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), state regulatory approval of a tariff gave antitrust immunity to a "free" light bulb policy that the company had incorporated into its tariff.

FPL's unfocused request (Petition at 19-21) that the Court reconsider these decisions suffers from a number of fundamental infirmities. To begin with, FPL never argued in the court of appeals that either the Federal Power Act or state regulatory approval immunized the territorial division.[9] We are dealing with afterthoughts that are not properly raised here. *See, e.g., Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958); *California* v. *Taylor*, 353 U.S. 553, 556 n.2 (1958). And FPL never so much as suggests what a reappraisal of *Otter Tail* and *Cantor* might mean for the instant case, or why, even in the abstract, reconsideration is required or desirable.

The case does not present these issues in any event. There is no issue of state regulatory approval because the territorial allocation in question had not been approved by any regulatory body. This was duly noted by the court of appeals, along with the district court's dispositive charge on the precise point. *See* App. A at 15a. Even FPL ultimately concedes that *Cantor* has nothing to do with the instant case. *See* Petition at 20 ("None of the issues presented here was resolved by the Court's subsequent opinion in *Cantor*. . . .").

[9] The Federal Power Act was not even cited in either FPL's brief or petition for rehearing.

Nor does the case present even a theoretical "immunity" issue under *Otter Tail* and the Federal Power Act. We are concerned here with a horizontal division of territories between competitors and not with purely unilateral conduct. Indeed, Justice Stewart, in the dissenting opinion upon which FPL relies so heavily, noted repeatedly that his contention regarding "implied repeal" did not extend to such a horizontal combination. *E.g.*, 410 U.S. at 391 ("in the absence of horizontal conspiracy"). *See also id.* at 387 n.5, 390 n.7.

CONCLUSION

The decision below was notable for the court's sensitivity to the record and respect for the verdict. After "an extensive review of the record" (App. A at 1a), the court sustained all but one of the jury's verdicts and carefully remanded for retrial the unresolved issues of injury, causation, and damages. With respect to the single issue of concerted action to allocate territories, the court concluded in a reasoned and comprehensive opinion that there was no substantial conflict in the evidence and n.o.v. was proper. We submit that FPL has demonstrated no compelling reason why this Court should review that decision, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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